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No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF AMICUS SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT

CLINT BOLICK
NICHOLAS C. DRANIAS
Counsel of Record
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Fax: (602) 256-7045
cbolick@goldwaterinstitute.org
ndranias@goldwaterinstitute.org

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PRECLEARANCE VIOLATES THE FOURTEENTH AMENDMENT BECAUSE "PRACTICAL EXPERIENCE" DICTATES THERE IS NO LONGER EXTRAORDINARY JUSTIFICATION FOR THE RACIALISM PRECLEARANCE SYSTEMATICALLY PROMOTES 6

A. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION HAS DIMINISHED TO THE POINT OF INSIGNIFICANCE. 8

B. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE PRECLEARANCE ITSELF HAS CAUSED AND CONTINUES TO THREATEN ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION 10

TABLE OF CONTENTS – Continued

Page

II. PRECLEARANCE UNCONSTITUTIONALLY COMMANDEERS TRADITIONAL ATTRIBUTES OF STATE SOVEREIGNTY WITHOUT CONGRUENCE OR PROPORTIONALITY TO THE GOAL OF REMEDYING ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION 13

CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Johnson, 521 U.S. 74 (1997) 8

Carrington v. Rash, 380 U.S. 89 (1965) 13

City of Boerne v. Flores, 521 U.S. 507 (1997) 14, 15, 16

City of Rome v. U.S., 446 U.S. 156 (1980) 5

Georgia v. Ashcroft, 539 U.S. 461 (2003) 7, 12, 16

Gregory v. Ashcroft, 501 U.S. 452 (1991) 1

Grutter v. Bollinger, 539 U.S. 306 (2003) 16

McMillan v. City of New York, 253 F.R.D. 247 (E.D.N.Y. 2008) 14

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) 13

New York v. U.S., 505 U.S. 144 (1992) 13

Plessy v. Ferguson, 163 U.S. 537 (1896) 6

Shaw v. Reno, 509 U.S. 630 (1993) 7

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 5, 8, 13, 15

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. X 1, 5, 13, 15

U.S. Const. Amend. XIV ..... *passim*

U.S. Const. Amend. XV 1, 5, 11, 14, 15

Ariz. Const. Art. 4, Pt. 2, Sec. 1 (West 2009) 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. § 1973c (West 2009) 2

42 U.S.C.A. § 1973c(b) (West 2009) 7

Internal Revenue Code Section 501(c)(3) 1

OTHER AUTHORITIES:

Abigail Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Georgetown J. Law & P. Pol. 41, 61-72 (2007), available at http://www.manhattan-institute.org/pdf/_journ_of_law-section5.pdf (last visited February 18, 2009).....7

Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony before the Subcommittee of the Constitution Committee on the Judiciary, House of Representatives, October 25, 2005 9

Edward Blum, Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, Study Submitted to the United States Senate Committee on the Judiciary (AEI May 17, 2006), at 2-3, available at http://www.aei.org/docLib/20060515_BlumCampbellreport.pdf (last visited February 18, 2009) 9, 11

TABLE OF AUTHORITIES – Continued

Page

Edward Blum, *The Unintended Consequences of Section 5 of the Voting Rights Act* 20-27 (AEI Press, Washington D.C., 2007), available at http://www.aei.org/docLib/20080818_UnintendedConsequencesBlum.pdf (last visited February 18, 2009) 2, 3, 7

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Robbie Sherwood, "Corr Consultants Admit Flaws Affected Redistrict Maps," Arizona Republic, May 6, 2002, 4B 3

Susan Falck, *Jim Crow Legislation Overview: Jim Crow Outside the South*, http://www.jimcrowhistory.org/scripts/jimcrow/lawsoutside.cgi?state=Arizona (last visited February 16, 2009) 3

Voting Rights Initiative at the University of Michigan Law School, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act, Study Submitted to the U.S. House Subcommittee on the Constitution (2006).....9

INTEREST OF AMICUS CURIAE[1]

Too often the conflict over Section 5 preclearance is falsely presented as a battle between individual rights and "state's rights." It is forgotten that the Tenth Amendment provides that powers not expressly delegated to the federal government have been reserved to the states "or to the people." The latter phrase underscores federalism's fundamental role in securing individual liberty by diffusing power between the state and federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). And it highlights that the purpose of securing individual liberty is the true touchstone for harmonizing the Tenth, Fourteenth and Fifteenth Amendments. It is from this perspective that the Scharf-Norton Center for Constitutional Litigation Goldwater Institute challenges the continued legitimacy of preclearance.

The Scharf-Norton Center for Constitutional Litigation is a division of the Goldwater Institute, which is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that

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[1] Counsel of record for all parties have either filed a blanket consent letter to amicus briefs in this case or they have received notice at least 10 days before the due date of the amici's intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

As an Arizona-based institution, the Goldwater Institute is deeply concerned about how Section 5 preclearance impacts Arizona and Arizonans. 42 U.S.C. § 1973c (West 2009). Three decades of preclearance have forced Arizona to abandon the ideal of color-blind government in favor of racialist redistricting. Most recently, in 2000, Arizona's constitution was amended by citizen's initiative to require competitive legislative redistricting by a nonpartisan, independent state agency known as the Independent Redistricting Commission. Ariz. Const. Art. 4, Pt. 2, Sec. 1 (West 2009); *see generally* Edward Blum, *The Unintended Consequences of Section 5 of the Voting Rights Act* 20-27 (AEI Press, Washington D.C., 2007), available at http://www.aei.org/docLib/20080818_UnintendedConsequencesBlum.pdf (last visited February 18, 2009). There is no evidence that this constitutional amendment was in any way motivated by active state-sponsored invidious discrimination

against protected classes. Nevertheless, in 2002, the Justice Department refused preclearance and required Arizona's Independent Redistricting Commission to abandon a redistricting map that would have maximized competitiveness in favor of one that maximized the electoral chances of various incumbent minority candidates. Blum, *Unintended Consequences*, at 26-27 (citing Robbie Sherwood, "Corr Consultants Admit Flaws Affected Redistrict Maps," Arizona Republic, May 6, 2002, 4B; Howard Fischer, "Redistricting Lines Rejected; New Plan Needed by Next Week for Federal Review," Arizona Daily Star, May 21, 2002, 4A). As a result, the need to secure preclearance caused the goal of maximizing minority representation to trump Arizona's state constitutional obligation to ensure competitive elections.

Such systematically racialist federal interference with Arizona's legitimate constitutional structures is grossly disproportionate to preclearance's asserted goal of securing equal voting rights from active state-sponsored invidious discrimination. Arizona, after all, was not one of the original covered states. In fact, three years before the Voting Rights Act was enacted, Arizona voluntarily repealed all of its historical Jim Crow-like laws. Susan Falck, *Jim Crow Legislation Overview: Jim Crow Outside the South*, http://www.jimcrowhistory.org/scripts/jimcrow/lawsoutside.cgi?state=Arizona (last visited February 16, 2009). There is no evidence that Arizona engages in active state-sponsored invidious discrimination to an extent that is remotely comparable in magnitude

to the original covered states. For this reason, the preclearance penalty box is no more justified for Arizona and its political subdivisions than it is for Appellant.

Because federalism is meant to protect individual liberty, state and local governments should not have a legal monopoly on protesting preclearance. Arizonans, who refuse to sacrifice their freedom and equality to an anachronistic obsession with race, deserve a voice as well. That is why the Institute filed this brief in support of Appellant.

SUMMARY OF ARGUMENT

Given the absence of significant evidence of active state-sponsored invidious discrimination in Arizona and other covered states, § 5 preclearance violates the Fourteenth Amendment because "practical experience" dictates there is no longer extraordinary justification for the racialism preclearance systematically promotes.

The "federalism costs" exacted by § 5 preclearance are no longer justified because preclearance unconstitutionally commandeers traditional attributes of state sovereignty without congruence or proportionality to the goal of remedying active state-sponsored invidious discrimination.

ARGUMENT

When the Voting Rights Act was enacted in 1965, Section 5 preclearance might have been the only feasible means by which equal voting rights under the Fifteenth Amendment could be enforced. But the days of the literacy test are long over. Minority political progress is no longer "modest and spotty." *City of Rome v. U.S.*, 446 U.S. 156, 181 (1980) (citations omitted). Pretending otherwise is not consistent with the touchstone of "practical experience," which the Court applied when it upheld preclearance nearly a half-century ago in *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). It is fantasy.

Commandeering the traditional attributes of state sovereignty through preclearance is no longer a reasonable prophylaxis to prevent active state-sponsored invidious discrimination, much less a congruent or proportionate means of effectuating the remedial purpose of the Fifteenth Amendment to the U.S. Constitution. Allowing preclearance to continue will only backfire by continuing to balkanize Americans along racial and ethnic lines. And it will also establish the dangerous precedent that Congress may needlessly disregard the Tenth Amendment, so long as incantations are offered to the Fifteenth Amendment.

For these reasons, the "practical experience" that animated *Katzenbach* dictates that we have arrived at the termination point of preclearance. It is time to liberate covered jurisdictions to exercise their sovereign powers in a manner that treats citizens as

unique individuals, rather than protected class cogs. The Court should strike down Section 5 preclearance as incompatible with principles of equality under the law and federalism.

I. PRECLEARANCE VIOLATES THE FOURTEENTH AMENDMENT BECAUSE "PRACTICAL EXPERIENCE" DICTATES THERE IS NO LONGER EXTRAORDINARY JUSTIFICATION FOR THE RACIALISM PRECLEARANCE SYSTEMATICALLY PROMOTES.

Preclearance has been on a collision course with the Fourteenth Amendment from its inception. The Fourteenth Amendment was meant to secure the ideal of "color-blind" government. *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Under the Fourteenth Amendment, "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools . . . it may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations omitted). Equality under the law demands that "government must treat citizens as individuals, not 'as simply components of a racial, religious, sexual or national class.'" *Id.* In contrast to these principles, preclearance systematically promotes an obsession with racial politics.

The 2006 reauthorization of preclearance should be regarded as a presumptively invalid, purposeful

decision to encourage state racialism. With or without *de jure* racial gerrymandering, it is no mystery that preclearance has caused and will continue to cause covered states to consciously segregate or consolidate voters based predominantly on their membership in one or more protected classes. Abigail Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Georgetown J. Law & P. Pol. 41, 61-72 (2007), available at http://www.manhattan-institute.org/pdf/_journ_of_law-section5.pdf (last visited February 18, 2009); Blum, *Unintended Consequences*, *inter alia*. Moreover, preclearance's purposeful promotion of state racialism is confirmed by the fact that the Voting Rights Act was amended explicitly to protect minority preferences in representation, thereby overturning *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* 42 U.S.C.A. § 1973c(b) (West 2009). Such government-sponsored racialism stigmatizes everyone because it entails the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Quoting Miller*, 515 U.S. at 912 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Accordingly, preclearance should be seen as presumptively invalid under general principles of equal protection. *Cf. Shaw*, 509 U.S. at 642-44. Correspondingly, the Court should require "extraordinary justification" for preclearance to withstand strict scrutiny under the Fourteenth Amendment. *Miller*, 515 U.S. at 911. Moreover, as discussed below, the fact that preclearance is purportedly remedial should not save it from the

same fate as the literacy test. "Practical experience" precludes a finding of "extraordinary justification" for Section 5 preclearance.

A. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION HAS DIMINISHED TO THE POINT OF INSIGNIFICANCE.

Because the reauthorization of preclearance is presumptively invalid, Congressional findings of necessity or remedial purpose are not entitled to deference. *Cf. Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (refusing to require district court to defer the legislature where the legislature was alleged to have engaged in unconstitutional conduct triggering strict scrutiny). Instead, the Court should independently assess the evidence in the record to determine whether extraordinary justification exists for preclearance's promotion of state racialism. That assessment should lead to the finding that active state-sponsored invidious discrimination of the sort originally targeted by *Katzenbach* has almost completely disappeared and, along with it, any "extraordinary justification" to reauthorize preclearance has evaporated.

The Congressional Record shows that by 2005 "there was no quantifiable difference in the voting rights exercised by minorities in covered jurisdictions

than in non-covered jurisdictions." Edward Blum, Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, Study Submitted to the United States Senate Committee on the Judiciary (AEI May 17, 2006), at 2-3, available at http://www.aei.org/docLib/20060515_BlumCampbellreport.pdf (last visited February 18, 2009). Moreover, "[s]ince 1982, more lawsuits brought under section 2 end[ed] with a determination of liability . . . in non-covered jurisdictions than in covered ones." *Id.* at 11 (citing Voting Rights Initiative at the University of Michigan Law School, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act, Study Submitted to the U.S. House Subcommittee on the Constitution (2006)). Ironically, to the extent that "discrimination" under the Act still occurs in covered states, it appears to furnish equal opportunity for victimhood. Blum, *Assessment of Voting Rights Progress*, at 12 (citing American Civil Liberties Union, "The Case for Extending and Amending the Voting Rights Act") (observing, in covered states, whites appear to have brought just as many successful Section 2 lawsuits as have protected minorities since 1982). Finally, the Justice Department's Section 5 preclearance objection rate of 4.0 percent, between 1965 and 1970, was more than 25 times greater than the 0.153 percent rate between 1996 and 2005. *Id.* at 9 (citing Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony before the Subcommittee of the Constitution, Committee on the

Judiciary, House of Representatives, October 25, 2005).

Active state-sponsored invidious discrimination against protected classes is all but extinct. For this reason, preclearance's continued systematic promotion of state racialism lacks "extraordinary justification." In fact, as discussed below, preclearance itself appears to be a significant source of what little state-sponsored discrimination still exists.

B. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE PRECLEARANCE ITSELF HAS CAUSED AND CONTINUES TO THREATEN ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION.

Despite the nation's obvious advance away from Jim Crow, government remains as fixated on race as ever. This ironic state of affairs suggests that preclearance itself has become the problem, rather than the solution. Indeed, as illustrated by the impact of *Miller v. Johnson*, continued enforcement of Section 5 preclearance has generated active state-sponsored discrimination on a truly tragic scale.

On June 29, 1995, *Miller* overturned a longstanding federal preclearance enforcement policy that essentially compelled race-based redistricting. *Id.*, 515 U.S. at 927 (holding "the Justice Department's implicit command that States engage in presumptively

unconstitutional race-based districting" unconstitutionally brings the Fifteenth Amendment "into tension with the Fourteenth Amendment") (citations omitted). The effect of *Miller* on preclearance enforcement policy was immediate – causing a precipitous drop in subsequent Justice Department preclearance objections. And a closer look at the data confirms that this inference does not invoke *post hoc ergo proctor hoc*.

It is as if *Miller* turned off a spigot of unconstitutional enforcement actions by the Justice Department. Between 1982 and 2005, approximately 672 of 753 Justice Department objections, nearly *90 percent* of the total, predate *Miller*.[2] Blum, *Assessment of Voting Rights Progress*, at 11 (citing Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony before the Subcommittee of the Constitution Committee on the Judiciary, House of Representatives, October 25, 2005). More than *eight times* as many preclearance objections were lodged by the Justice Department *before Miller* as *after*. *Id.* The average of 51 objections per year prior to *Miller* dropped to a subsequent average of 8 per year. *Id.* In the decade preceding *Miller*, the Justice Department lodged no fewer than 495 objections to preclearance applications. *Id.* By contrast, in the decade following *Miller*, the Justice Department lodged no more than

[2] The data presented assume that 10 of the 19 Justice Department objections lodged in 1995 pre-date *Miller*.

79 objections. *Id.* Finally, there is not a single year after 1995 in which as many objections were lodged by the Justice Department as in *any* year preceding 1995. *Id.* These statistics are not better explained by random or exogenous cultural, social or political factors than by the natural impact of the Court's decision in *Miller* on Justice Department policy.

Given the sudden and dramatic drop in preclearance objections following *Miller*, which is consistent across ideologically distinct presidential administrations, it stands to reason that the bulk of the pre-*Miller* preclearance objections were actually the product of the very discriminatory policies that were overturned in *Miller*. In other words, for more than a decade, Section 5 preclearance systematically enabled and promoted pervasive unconstitutional racial discrimination – not unlike a facially race-neutral literacy test. And most tragically, Congress likely relied upon unconstitutional discrimination *caused by preclearance* to justify reauthorizing preclearance in 2006.

As observed by Justice Kennedy in his concurrence to *Georgia v. Ashcroft*, "There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*, 539 U.S. at 491 (Kennedy, J., concurring). The fundamental flaw of Section 5 preclearance is that it is a race conscious policy that Congress reauthorized past its natural termination point.

Accordingly, the Court should recognize that the 2006 reauthorization of preclearance violates the Fourteenth Amendment because it purposely encourages state racialism without extraordinary justification. Preclearance can only do constitutional mischief playing with racialist fire because it is a solution in search of a problem.

II. PRECLEARANCE UNCONSTITUTIONALLY COMMANDEERS TRADITIONAL ATTRIBUTES OF STATE SOVEREIGNTY WITHOUT CONGRUENCE OR PROPORTIONALITY TO THE GOAL OF REMEDYING ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION.

Preclearance is not a run-of-the-mill Congressional incursion into state sovereignty. The Court has previously observed that preclearance exacts significant "federalism costs." *Miller*, 515 U.S. at 926. Indeed, no one disputes that the powers reserved to the states under the Tenth Amendment historically include the power to regulate the right of suffrage. *Carrington v. Rash*, 380 U.S. 89, 91-92 (1965). Correspondingly, by dictating the terms on which such power can be exercised, it is readily apparent that preclearance commandeers state sovereign power much like the federal laws declared unconstitutional under the Tenth Amendment in *New York v. U.S.*, 505 U.S. 144 (1992), and *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). Nevertheless, the lower court decided that *Katzenbach* foreclosed the possibility of

raising federalism objections to preclearance. The lower court also distinguished the proportionality test in *City of Boerne v. Flores*, 521 U.S. 507 (1997), on the grounds that heightened scrutiny was only required for enforcement legislation under the Fourteenth Amendment. The lower court was mistaken in these rulings.

Congress is not entitled to more deference when exercising its enforcement authority under the Fifteenth Amendment than under the Fourteenth Amendment. Given that race and ethnicity are increasingly viewed as social and cultural constructs rather than biological categories, there is an inherent and growing risk of preclearance imbuing the Fifteenth Amendment with new substantive rights for classes of individuals not originally encompassed by its original meaning or purpose. *Cf. McMillan v. City of New York*, 253 F.R.D. 247, 249-56 (E.D.N.Y. 2008) (discussing the conceptual and legal difficulties involved in defining racial categories). This risk is magnified by the Justice Department's history of officially interpreting preclearance to mandate race-based gerrymandering – effectively granting special electoral privileges to members of protected classes (usually incumbents).

If anything, preclearance may pose a greater threat to vital constitutional principles than legislation enforcing the Fourteenth Amendment. Aggressive federal efforts to enforce the Fifteenth Amendment through preclearance can cause unconstitutional "tension with the Fourteenth Amendment," by forcing

states to choose between race consciousness and race neutrality. *Miller*, 515 U.S. at 927. This "Hobson's choice" is both fundamentally unfair and an invasion of state sovereignty. By contrast, it is difficult to imagine how legislation meant to enforce the Fourteenth Amendment could generate a similar constitutional conundrum. Accordingly, to the very extent that the stringency of judicial review should be elevated under the Tenth Amendment to counteract an elevated risk of Congressional overreaching, as posited by the lower court, *City of Boerne*'s congruence or proportionality standard must be seen as setting the floor for judicial review of preclearance.

Applying *City of Boerne*, there should be no doubt that the 2006 reauthorization of preclearance disproportionately commandeers traditional attributes of state sovereignty in violation of the Tenth Amendment. As discussed in the preceding section, the extraordinary circumstances that prompted *Katzenbach* to embrace preclearance as a reasonable remedy under the Fifteenth Amendment no longer exist because there is little, if any, active state-sponsored invidious discrimination against members of protected classes. Moreover, preclearance is more likely the *cause* of present-day invidious discrimination than the remedy, because it has systematically encouraged states to engage in unjustifiable racialism in redistricting and outright racial gerrymandering. A remedial law that actually promotes the evil it is supposed to remedy obviously "reflects a lack of

proportionality or congruence between the means adopted and the legitimate end to be achieved." *Quoting City of Boerne*, 521 U.S. at 533. For this reason, the Court should declare the 2006 reauthorization of Section 5 preclearance inconsistent with the "vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

CONCLUSION

The Court has held that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia*, 539 U.S. at 490. Unfortunately, since 1982, Section 5 preclearance has systematically backfired against this purpose. Instead of preventing and remedying active state-sponsored discrimination against protected classes, preclearance has promoted a new kind of invidious state racialism and racial gerrymandering.

Six years ago, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court observed that all "race-conscious" policies must eventually "have a termination point." A race-conscious law that systematically strikes at the heart of federalism and equal protection should end sooner rather than later. Accordingly,

the Court should declare that preclearance reached its termination point long ago.

Respectfully submitted,

CLINT BOLICK
NICHOLAS C. DRANIAS
Counsel of Record
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
FAX: (602) 256-7045
cbolick@goldwaterinstitute.org
ndranias@goldwaterinstitute.org